Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-947

In The

Supreme Court of the United States

October Term, 1996

JODY H. DERAMUS,

Petitioner,

vs.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

D. COLLIER GRAHAM, JR.
Counsel of Record
EUGENE NAYLOR
DEBBIE GOSWAMI
SHELL, BUFORD, BUFKIN,
CALLICUTT & PERRY
Attorneys for Respondent
920 Trustmark Building
P.O. Box 157
Jackson, Mississippi 39205
(601) 948-2291

70333 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

45 pp

QUESTIONS PRESENTED

I. WHETHER THE ISSUE OF CERTIFICATION WHICH WAS NOT RAISED IN THE LOWER COURT CAN BE BROUGHT FOR REVIEW BEFORE THE UNITED STATES SUPREME COURT, AS THE MATTER HAS NOT BEEN PRESERVED FOR APPEAL.

II. WHETHER THE FIFTH CIRCUIT ERRED BY ADOPTING THE DISTRICT COURT'S OPINION, AND NOT EXPRESSLY VERBALIZING ITS STANDARD OF REVIEW AS DE NOVO.

III. WHETHER THERE IS ANY SPLIT IN THE CIRCUITS SINCE ALL CIRCUITS UNDERSTAND THAT THE USAGE OF CERTIFICATION IS DISCRETIONARY AND ALL CIRCUITS APPRECIATE THEIR DUTIES TO MAKE PREDICTIONS OR *ERIE*-GUESSES ON MATTERS OF STATE LAW.

IV. WHETHER RESORT TO CERTIFICATION BY THE FIFTH CIRCUIT IS NECESSARY WHEN THERE EXISTS AMPLE AUTHORITY IN MISSISSIPPI CASE LAW UPON WHICH TO BASE ITS DECISION.

V. **WHETHER THE PETITIONER SHOULD BE ALLOWED TO ARGUE TO THIS COURT THAT THE LAW WAS UNSETTLED AND AMBIGUOUS, WHEN IN THE LOWER COURTS, SHE ADVANCED THE OPPOSITE THEORY THAT THE LAW WAS SUFFICIENTLY CLEAR AND IN HER FAVOR SO AS TO AWARD HER SUMMARY JUDGMENT AS A MATTER OF LAW.**

VI. **WHETHER CERTIFICATION SHOULD BE PURSUED AS IT IS NOT EXPEDIENT, AND THERE IS NO GUARANTEE THAT THE MISSISSIPPI SUPREME COURT WILL ANSWER THE CERTIFIED QUESTION.**

LIST OF INTERESTED PARTIES

The Petitioner is Jody Deramus, individually, and as administratrix of the Estate of Frank Deramus.

The Respondent is Jackson National Life Insurance Company, a wholly owned subsidiary of Prudential Corporation, p.l.c. London, England.

TABLE OF CONTENTS

Questions Presented i

List of Interested Parties iii

Table of Contents iv

Table of Authorities vi

Respondent's Brief in Opposition 1

Opinions Below 1

Statement of Jurisdiction 2

Statement of the Case 3

Reasons for Denying the Writ 8

I. The record is devoid of any indication that the Fifth Circuit employed any other standard than de novo review. 8

II. The certification issue was not raised in the lower court, and is therefore procedurally barred from review by the United States Supreme Court. 11

III. All circuits understand that certification is discretionary, and there is no confusion or conflict among the circuits on the use of certification. 13

A. There is no confusion among the circuits as to certification. 15

B. Having certified in the recent past a similar question to the Mississippi Supreme Court, and having the benefit of other existing Mississippi case authority, the Fifth Circuit had a more than ample basis to decide the issue of law without resorting to certification. 21

1. Certification in the recent past on question of duty was applicable authority. 22

2. Clear and controlling precedent existing in Mississippi case law on the duty to disclose. 24

C. The Petitioner contradicts herself and advances a theory on appeal which is inconsistent with that argued in the lower courts, and is therefore, procedurally barred. 26

Conclusion 29

TABLE OF AUTHORITIES

CASES

Alexander v. Town & Country Estates, Inc.,
535 F. 2d 1081 (8th Cir. 1976) 28

Barnes v. Atlantic & Pacific
Life Ins. Co. of America,
514 F. 2d 704 (5th Cir. 1975) 14

Batts v. Tow-Motor Forklift Co.,
66 F. 3d 743 (5th Cir. 1989) 17

Boyter v. C.I.R. Services,
668 F. 2d 1382 (4th Cir. 1981) 14

Browzin v. Catholic University of America,
527 F. 2d 843 (D.C.Cir. 1975) 28

California v. Taylor,
353 U.S. 553 (1957) 11

Campbell v. Cutler Hammer, Inc.,
996 F. 2d 1164 (11th Cir. 1993) 20

Canton v. Harris, 489 U.S. 378 (1989) 11

Capps v. Humble Oil & Refining Co.,
536 F. 2d 80 (5th Cir. 1976) 28

Colonial Properties, Inc. v. Vogue Cleaners,
Inc., 77 F. 3d 384 (11th Cir. 1996) 15,19

Cowan v. Ford Motor Company, 437 So.2d 46 (Miss. 1983) 15

Dabney v. Montgomery Ward & Co., Inc., 761 F. 2d 494 (8th Cir.1985) 17

E.E.O.C. v. Fair Labor Relations Authority, 476 U.S. 19, 24 (1986) 11, 12

Elkins v. Moreno, 435 U.S. 647, 662 n.16 (1978) 14,16

Farsian v. Pfizer, 52 F. 3d 932 (11th Cir. 1995) 20

Foster v. Bass, 575 So. 2d 967 (Miss. 1990) 25

F.T.C. v. Grolier, 462 U.S. 19, 23 n.6 (1983) 9,11

Giffin v. Summerlin, 78 F. 3d 1227 (7th Cir. 1978) 17

Henkin v. Northrop Corp., 921 F. 2d 864 (9th Cir. 1990) 17

Hines v. Joy Mfg. Co., 850 F. 2d 1146 (6th Cir. 1988) 17

Howell v. Celotex Corp., 904 F. 2d 3 (3rd Cir. 1990) 16

Houston v. Hill, 482 U.S. 451 (1987) 13,14,18,21

In re Fingado, 955 F. 2d 31 (10th Cir. 1992) 19

Jackson v. Johns-Mansville Sales Corp., 781 F. 2d 394, *cert. denied*, 478 U.S. 1022 (5th Cir. 1986) 16

Jones v. Harris, 460 So.2d 120 (Miss. 1984) 15

Kassman v. America University, 546 F. 2d 1029 (D.C.Cir. 1976) 28

Lehman Brothers v. Schein, 416 U.S. 386 (1974) 12, 13,14,17,18,20

Long v. Patterson, 22 So. 2d 490 (Miss. 1945) 24,25

Magnum Import Co. v. Coty, 262 U.S. 159 (1923) 2

Marston v. Red River Levee & Drainage Dist.,632 F. 2d 466 (5th Cir. 1980) 20

Meredith v. City of Winter Haven, 320 U.S. 228 (1943) 14,17

McGuire Oil Co. v. Mapco, Inc., 958 F. 2d 1552 (11th Cir. 1992) 20

Micomonaco v. State of Washington, 45 F. 3d 316 (9th Cir. 1995) 19

Morrissey v. Williams Morrow & Co., Inc., 739 F. 2d 962 (4th Cir. 1984) 16

Noble v. U.S. Parole Comm'n, 82 F. 3d 1108 (D.C. Cir. 1996) 19

Oklahoma Tax Commission v. Chickasaw Nation,
515 U.S. ___, 132 L.Ed.2d 400 (1995) 12

Patz v. St. Paul Fire & Marine Ins. Co.,
15 F. 3d 699 (7th Cir. 1994) 19

Plummer v. Lederle Laboratories, Div. of
American Cyanamid Co., 819 F. 2d 349
(2nd Cir. 1987) 16

Puckett v. Rufenacht, Bromagen & Hertz,
587 So. 2d 273 (Miss. 1991) 21,22,23,25

Roe v. Doe, 28 F. 3d 404 (4th Cir. 1994) 19

Roe v. State of Alabama, 68 F. 3d 404
(11th Cir. 1995) 20

Ryans v. Royal Ins. Co. of America,
916 F. 2d 731 (1st Cir. 1990) 16

Salve Regina College v. Russell,
499 U.S. 225 (1991) 9,10,14,18

Starks v. Rent-A-Center,
58 F. 3d 358 (8th Cir. 1995) 19

Tarr v. Manchester Ins. Corp.,
544 F. 2d 14 (1st Cir. 1976) 28

Towne Realty, Inc. v. Safeco Ins. Co.
of America, 854 F. 2d 1264 (11th Cir. 1988) 17

Transamerica Ins. Co. v. Duro Bag Mfg. Co.,
50 F. 3d 370 (6th Cir. 1995) 19

Transcontinental Gas Pipeline Corp. v. Transportation
Ins. Co., 958 F. 2d 622 (5th Cir. 1992) 19

Universe Tankships, Inc. v. United States,
528 F. 2d 73 (3rd Cir. 1975) 28

United States v. Williams, 504 U.S. 36 (1992) 11

VanHaaren v. State Farm Mut. Auto.
Ins. Co., 989 F. 2d 1 (1st Cir. 1993) 18

Wassall v. DeCaro, 91 F. 3d 443
(3rd Cir. 1996) 18

Watson v. City of New York, 92 F. 3d 31
(2nd Cir. 1996) 18

Weiss v. United States, 787 F. 2d 518
(10th Cir. 1986) 17

Youakim v. Miller, 425 U.S. 231 (1976) 9

RULES AND STATUTES

Mississippi Rules of Appellate Procedure, Rule 20 15,21

Mississippi State Department of Health, Rules and
Regulations Governing Reportable Diseases (1985) 5

OTHER SOURCES

17A Wright, Miller & Cooper, Federal Practice and Procedure; Jurisdiction 2d § 4248 (2d ed. 1988) 20,21

Steve Kirchmayr, *Reducing the Appellate Docket*, Mississippi Judicial College News (1996) 15

APPENDIX

Steve Kirchmayr, *Reducing the Appellate Docket*, Mississippi Judicial College News (1996) A1

RESPONDENT'S BRIEF IN OPPOSITION

In this case, the Petitioner asserts that review by the Supreme Court is warranted in order to bring into equilibrium the rate at which the various circuits certify state law questions. This quest for certification parity is a smokescreen not deserving of treatment on either substantive or procedural grounds, as the issue was never put before the lower court. It is disingenuous in the extreme for Mrs. Deramus to have argued in both the district court and the Court of Appeals that existing Mississippi law was sufficiently clear and in her favor for her to prevail on the issues, and now that the merits have been decided adversely to her, to argue that state law on the subject was so unclear that certification to the Mississippi Supreme Court was mandated, even in the absence of a request on her part for certification. She wants nothing less than the proverbial second bite at the apple. Moreover, the Petitioner never once argues in her certiorari petition that the district court or the Court of Appeals wrongly decided the merits of her case, or that the Mississippi Supreme Court would have decided any differently. Accordingly, Respondent Jackson National Life Insurance Company respectfully requests this Court deny writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

All lower court opinions in this matter are set forth in the Appendix attached to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

A writ of certiorari is not a matter of right, but of judicial discretion. The discretionary grant of a writ is reserved for exceptional cases: first, where review is necessary to secure uniformity of decision between and among the Courts of Appeals, and second, where the case involves questions of importance which it is in the public interest to have decided by this Court of last resort. Magnum Import Co. v. Coty, 262 U.S. 159 (1923). Jurisdiction in the Supreme Court is not exercised merely to give the defeated party in the Court of Appeals another hearing. Id.

The decision of the United States Court of Appeals for the Fifth Circuit in the Case of *Jody Deramus v. Jackson National Life Insurance Company*, No. 95-60675, which Petitioner seeks to review herein by certiorari, rests on no proposition which creates an actual conflict between the United States Courts of Appeals. While the writ petition is laced with the appropriate "conflict among circuits" trimmings, the alleged "conflicting" issue of certification was never put before the lower court for its review, and as such, this newly presented argument may not be properly considered by this Court. By belatedly raising the certification issue, Petitioner is merely seeking another hearing in another forum. This tactic cannot supply a basis for jurisdiction in this Court which is otherwise clearly lacking. Furthermore, this case does not involve any issues the settlement of which is of national importance, as the underlying dispute is a private tort claim for monetary damages, and the Fifth Circuit's per curiam affirmance of the trial court's interpretation of Mississippi precedent did not, as Petitioner contends, suddenly create a public policy question.

STATEMENT OF THE CASE

The Petitioner's statement of the facts makes several bold assertions which are nowhere contained in the record, and more seriously, many misrepresentations of which Respondent is compelled to make this Court aware.

In January 1988, Frank Deramus had a life insurance policy with Jackson National Life Insurance (hereinafter "JNL"), which provided coverage of $500,000. Mr. Deramus, in an effort to increase his coverage, applied for additional life insurance in the amount of $300,000. Mrs. Deramus also submitted an application for a $250,000 life insurance policy with JNL.

As part of the application process, JNL required its applicants to submit to certain blood tests through local paramedical facilities used by JNL. The results of these tests were used by JNL to assess its underwriting risk in extending insurance coverage to its applicants. JNL reserved the right to refuse coverage if an applicant failed the blood tests.

Before Mr. Deramus submitted a blood sample, he signed a consent form wherein he acknowledged what tests his blood might be subjected to, including HIV, that JNL was performing these lab tests exclusively for its own purposes of evaluating an underwriting risk, and that as member of the Medical Information Bureau (hereinafter "MIB" which is an insurance industry databank organized for the prevention of fraud among insurance applicants), JNL had the right to submit

those test results to MIB.[1] Unfortunately, when JNL received the results, they indicated that Mr. Deramus was HIV positive. Consistent with its underwriting standards, JNL rejected Mr. Deramus' application for additional life insurance; however, Mrs. Deramus was issued a policy.

The notice of rejection mailed to Mr. Deramus on April 26, 1988, did not tell him that he had been rejected because of the blood test results. Instead, through clerical error, the form letter indicated that his application had been rejected "because delivery of the policy was not accepted." However, the oversight was corrected two days later when the Deramuses' agent was advised that Mr. Deramus' application was rejected for medical reasons, and he in turn notified and communicated to Mr. Deramus that his application was declined for undisclosed and nonspecific confidential medical reasons.

Petitioner's assertion that Mr. Deramus asked repeatedly for his medical information is simply not true.[2] Moreover, Mr.

---

1. In the event of an HIV-positive test result, the report would merely indicate that the applicant had a nonspecific abnormal blood test result. Petitioner asserts that the test results were received by a Dr. Lewis Stewart. This is not true. The record is undisputed in reflecting that the testing laboratory put the name of JNL's medical director, Dr. Stewart, on the test results as a matter of protocol indicating that he was the medical director for JNL, but the test results were sent straight to the underwriting department.

2. JNL has no record of any request from Mr. Deramus prior to April 1991, and upon receipt of that request, JNL promptly provided the test results to his designated physician. Furthermore, the record simply does not support the claim that anyone made a promise to disclose the medical information to Mr. Deramus. The Deramuses' agent merely suggested to Mr. Deramus that he could attempt to write JNL requesting information regarding the medical

Deramus did not rely on JNL to supply him with a diagnosis of his condition since the record is exceedingly clear that during the eighteen months following the denial of the additional life insurance by JNL, Mr. Deramus was under the active care and treatment of over twenty physicians, several of whom specialized in the diagnosis of infections, such as HIV. Thus, a blood test could have been run by any of Mr. Deramus' physicians at any time.[3]

In October 1989, Mr. Deramus was hospitalized at Johns-Hopkins Medical Center, where he was diagnosed as HIV infected. Mrs. Deramus was also tested shortly thereafter, and was found to be uninfected. Subsequent testing of Mrs. Deramus shows that she remains uninfected[4] and that there is no

---

reasons for rejecting his application; however, he did not guarantee that any information would be forthcoming.

In any event, whether or not the Deramuses made a request for information is immaterial to the resolution of the duty issue under Mississippi law. JNL did not assume or undertake any duty to advise Mr. Deramus as to the condition of his health, and Mr. Deramus never acted with justifiable reliance on JNL to function in the role of a physician.

3. Petitioner asserts that Mississippi has a public policy that encourages reporting of sexually transmitted diseases to the appropriate state authorities. Mississippi State Department of Health, Rules and Regulations Governing Reportable Diseases (1985). However, the Petitioner fails to note that these Rules and Regulations only apply to physicians within the State of Mississippi.

4. Petitioner asserts that she and her husband had been trying to conceive a child during this period. The record is completely bereft of this information, (and Respondent denies same). The Petitioner further asserts that Mr. Deramus did not engage in homosexual or other high risk activity to expose him to the HIV virus. Again, the record does not support this

realistic chance that she will ever be HIV infected due to any possible exposure from Mr. Deramus. On June 28, 1991, Mr. Deramus died from AIDS related complications.

On March 19, 1992, Mrs. Deramus, individually and as the administratrix of the estate of her deceased husband, Mr. Deramus, filed a Complaint against JNL in the Circuit Court of the First Judicial District of Hinds County, Mississippi, seeking individual tort damages in the amount of $5,000,000 for actual damages, and $10,000,000 in punitive damages; the Complaint did not seek injunctive or declaratory relief. JNL removed the action to the United States District Court for the Southern District of Mississippi on the basis of diversity jurisdiction.

On April 18, 1994, the Plaintiff-Petitioner moved for a partial summary judgment on the issue of liability taking the position that there was "no genuine issue of material fact" and that she was entitled to a ruling "as a matter of law" on the claim that JNL owed and breached a duty to disclose to her and her husband the results of the blood test run in conjunction with their applications for insurance to JNL. In response, JNL filed its own cross-motion to dismiss or for summary judgment, arguing that as a matter of law it had no duty to disclose to the Deramuses the results of its risk evaluation, including blood tests, and that regardless of the existence *vel non* of any duty to disclose medical information, JNL was still entitled to a summary judgment because the record revealed that no injury or damage was proximately caused or contributed to by the alleged negligence of JNL. **The Petitioner at no time during**

---

assertion. Petitioner also claims that she faced exposure to HIV through her husband; again, all subsequent tests on Mrs. Deramus show that she is HIV negative.

the district court litigation suggested that Mississippi law on the issues presented was unclear; to the contrary, Plaintiff-Petitioner argued that there was no genuine issue of material fact and that the law was sufficiently clear to enable her to prevail as a matter of law.

Upon reviewing the respective cross-motions, the district court, in a rather lengthy and exhaustive opinion, rejected each of the Plaintiff's various theories for the recognition of a duty. The district court made an *Erie*-guess, as this exact fact pattern had never been presented to the Mississippi Supreme Court, and interpreted existing Mississippi case law to determine the course the Mississippi Supreme Court would follow. The district court responded to each issue raised.

The case was appealed to the Fifth Circuit. In addition to receiving the respective briefs of the parties, the Fifth Circuit granted Mrs. Deramus' request to present oral argument. **In neither oral argument nor in her brief and reply brief submitted to the Fifth Circuit, did the Plaintiff-Petitioner ask for certification of the primary question. As Petitioner again argued that the law was sufficiently clear and in her favor, she in effect assured the Fifth Circuit that it was capable of deciding the duty question without the assistance of the Mississippi Supreme Court**. Moreover, both the Plaintiff-Petitioner and the Defendant-Respondent, as is written in their respective briefs, agreed that the standard of review was de novo. After considering the arguments raised in the briefs and at oral arguments, the Fifth Circuit affirmed the ruling of the district court in an unanimous per curiam opinion.

The Plaintiff-Petitioner then filed a petition for rehearing en banc. In that brief, **Mrs. Deramus again chose not to**

request certification of a question to the Mississippi Supreme Court, and did not press her recently-formulated argument that the Court of Appeals allegedly failed to employ a de novo standard of review. In a rather emotional plea, Plaintiff again relied on Mississippi jurisprudence, which she claimed "contain[ed] numerous examples" of a statutory or common law obligation to compel disclosure, thereby arguing that Mississippi law was clear and in her favor. (Appellant's Rehearing Brief at 12). The Fifth Circuit denied rehearing.

Hence, this Petition for Writ of Certiorari followed. However, instead of pursuing the legal theories asserted in the lower courts, the Petitioner has decided to put before this Court issues never seen or heard of in this case until now. Moreover, the Petitioner is attempting to invoke this Court's discretionary certiorari power by creating from whole cloth a "conflict among circuits" argument to gain entrance to this Court.

REASONS FOR DENYING THE WRIT

I.

THE RECORD IS DEVOID OF ANY INDICATION THAT THE FIFTH CIRCUIT EMPLOYED ANY OTHER STANDARD THAN DE NOVO REVIEW.

The Petitioner contends that Salve Regina College v. Russell, 499 U.S. 225 (1991) mandates that de novo review be conducted for all district court judgments in which an *Erie*-guess was made on a question of state law in the disposition of the case. It is further asserted that the Fifth Circuit did not review the decision of the district court de novo, and that

consequently, certiorari should be granted to correct this alleged error. This argument is simply without merit and provides no basis for the Court to undertake review.

First, there is absolutely no indication whatsoever that the Court of Appeals did not employ a de novo standard in the instant case. As stated earlier, both Mrs. Deramus and JNL in their respective briefs to the Fifth Circuit indicated that the standard of review was de novo. Merely because the Fifth Circuit panel issued an unanimous per curiam affirmance adopting the reasoning of the district court does not support any inference that the Court of Appeals failed to conduct a de novo review.

Second, in her suggestion for rehearing before the Fifth Circuit, Petitioner did not raise this alleged failure to follow the proper standard of review as a ground for reconsideration, and thus, it is waived or procedurally barred. Youakim v. Miller, 425 U.S. 231 (1976); F.T.C. v. Grolier, 462 U.S. 19, 23 n.6 (1983).

Third, the holding of Salve Regina is fairly limited, in that the de novo review "mandate . . . only [applies] in those few cases where the appellate court would resolve an unsettled issue of state law differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error." 499 U.S. at 237-38.

Fourth, the facts of Salve Regina involved a full blown trial conducted at the district court level. Because trials are so cumbersome and exhausting on trial judges who have to continuously make evidentiary rulings in their role as fact-finder, the Supreme Court insisted that, on appeal, a de novo standard

was more favored as it would let a panel of appellate judges pause for an "extended reflection" and engage in "reflective dialogue and collective judgment." 499 U.S. at 232. In the case at bar, the lower court did not have to confront the pressures of a trial and was faced only with answering a question as a matter of law on cross-motions for summary judgment; thus, the concerns of Salve Regina are not at play here.

Fifth and most important, is that the Salve Regina Court recognized that "[i]f the [C]ourt of [A]ppeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in an appellate opinion." 499 U.S. at 232-33. Thus, there is no need for the written expression of yet more "reflective judgment" by the Court of Appeals when the district court, as was the case here, was faced with a pure question of law, and in its resolution of the issues, rendered a lengthy and exhaustive opinion on the subject at bar. In fact, even "[i]n a case where the controlling question of state law remains unsettled, it is not unreasonable to assume that the considered judgment of the [C]ourt of [A]ppeals frequently will coincide with the reasoned judgment of the district court." 499 U.S. at 237. Thus, the fact that the Fifth Circuit adopted the lower court's opinion *in toto* is not unreasonable under the circumstances presented here, where the lower court issued such a lengthy opinion thoroughly addressing each and every claim made by Petitioner.

Again, the record does not indicate that the Fifth Circuit failed to make a de novo inquiry; the record indicates that the Fifth Circuit's opinion on the matter coincided with that of the district court, and the per curiam panel also found that Petitioner's claims were meritless.

II.

THE CERTIFICATION ISSUE WAS NOT RAISED IN THE LOWER COURT, AND IS THEREFORE PROCEDURALLY BARRED FROM REVIEW BY THE UNITED STATES SUPREME COURT.

It is a time honored principle that the "Supreme Court will not address issues not raised in the Court of Appeals." F.E.O.C. v. Fair Labor Relations Authority, 476 U.S. 19, 24 (1986); F.T.C. v. Grolier, 462 U.S. 19, 23 n.6 (1983); Canton v. Harris, 489 U.S. 378 (1989) (where a claim was not passed on by Court of Appeals and was not presented to the district court for decision, it would not be considered by the Supreme Court on a writ of certiorari); California v. Taylor, 353 U.S. 553 (1957) (where argument was not briefed nor mentioned in oral argument, it would be considered waived and Supreme Court would not recognize such contention on certiorari). Traditional Supreme Court practices preclude grant of certiorari when the question presented was not pressed or passed on below. United States v. Williams, 504 U.S. 36 (1992).

Thus, the Supreme Court is precluded from granting certiorari on the certification question presented by Petitioner in its Petition for Writ of Certiorari. The Petitioner had at least two opportunities to request certification of a question of law to the Mississippi Supreme Court, and failed on each occasion. Now, out of left field, Petitioner seeks to lodge this colorable claim before the highest Court in the land, without allowing the court below to pass judgment.

Petitioner does not present any reasons justifying the Supreme Court departing from its traditional practice and to

grant the writ, especially when the Petitioner is now seeking, for the first time, certification to the state Supreme Court at such a late stage in the game. *See* Lehman Brothers v. Schein, 416 U.S. 386, 392 (1974) (concurring, Rehnquist, C.J.) (disapproval noted of petitioner who sought certification for the first time at the petition for rehearing in the Court of Appeals because "petitioners s[ought] to upset the result of more than two years of trial and appellate litigation on [the] basis of [that] point"). As a court of review, not one of first view, the Supreme Court will entertain issues withheld until merits briefing "only in the most exceptional cases." Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. ___, ___, 132 L.Ed.2d 400, 408 (1995). The Petitioner cites no exceptional circumstances in this case to justify the Court relaxing the procedural bar here.

In any event, where the failure of the Petitioner to present an issue to the lower court on which she seeks the Supreme Court to grant certiorari, is "brought to [the Court's] attention . . . in respondent's brief in opposition to the petition for certiorari," the Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals." E.E.O.C. v. Fair Labor Relations Authority, 476 U.S. 19, 24 (1986). Since JNL has brought to the Court's attention the fact that Mrs. Deramus did not raise in the lower courts the issue of certifying any question to the Mississippi Supreme Court, the United States Supreme Court must find this issue is procedurally barred, and alternatively, not worthy of review.

III.

ALL CIRCUITS UNDERSTAND THAT CERTIFICATION IS DISCRETIONARY, AND THERE IS NO CONFUSION OR CONFLICT AMONG THE CIRCUITS ON THE USE OF CERTIFICATION.

Certification is not obligatory, but is clearly discretionary. Lehman Brothers v. Schein, 416 U.S. 386, 390-91 (1974) (the Court held that "[w]e do not suggest that where there is doubt as to local law and where certification procedure is available, resort to it is obligatory"); Elkins v. Moreno, 435 U.S. 647, 662 n.16 (1978) (certification is "not always possible nor . . required"). In the spirit of "cooperative judicial federalism . . . [i]ts use in a given case rests in the sound discretion of the federal court." Lehman Brothers, 416 U.S. at 391. It certainly would not be "cooperative," to require Courts of Appeals to submit virtually all state law questions to the highest state court for resolve. For that reason, certification remains discretionary. In this case, that discretion was not abused, particularly when certification was neither requested by Mrs. Deramus nor suggested by her to the Fifth Circuit that state law was so unsettled as to warrant certification.

Moreover, if the rule were anything but discretionary, federal courts would be encouraged to abdicate their Article III function to be a court of competent jurisdiction, where the federal court's very task is to predict/ interpret how the highest court of that State would decide the question. Houston v. Hill, 482 U.S. 451, 468 (1987) (even if the statute has never been interpreted by a state tribunal, it is the duty of the federal court to exercise its properly invoked jurisdiction). State supreme courts would become dumping grounds for every federal case

in which there was no exact replica in state case law. Barnes v. Atlantic & Pacific Life Ins. Co. of America, 514 F. 2d 704, 705 n.4 (5th Cir. 1975) (we use much judgment, restraint and discretion in certifying; we do not abdicate); Boyter v. C.I.R. Services, 668 F. 2d 1382 (4th Cir. 1981) (we do not care to burden our state counterparts with unnecessary certification requests). Virtually all *Erie*-guesses would become candidates for certification. The "mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." Lehman Brothers, 416 U.S. at 390-91.

Another factor for consideration in the certification equation is that the procedure should not be pursued where it is not expedient. In certain instances, certification "saves time, energy, and resources," Lehman Brothers, 416 U.S. at 391, but in others "it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court." 416 U.S. at 394.[5] In this case, substantial delay

---

5. *See also* Salve Regina, 499 U.S. at 237 n.4 (certification should be pursued where it can be "successfully utilized"); Elkins v. Moreno, 435 U.S. 647, 662 n.16 (1978) (certification desirable where it is an "efficient method for obtaining a ruling from the highest court of the State"); Houston v. Hill, 482 U.S. 451, 471 (1987) (where delay and expense are chief drawbacks in abstention, then only does availability of certification become an important factor); Meredith v. City of Winter Haven, 320 U.S. 228, 237 (1943) (to remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it).

would certainly occur.[6]

Moreover, even upon application for certification by a federal court, the Mississippi "Supreme Court may, in its discretion, decline to answer the questions certified to it." Mississippi Rules of Appellate Procedure, Rule 20.[7] There is no guarantee that the Mississippi Supreme Court would answer a question certified from this case, especially in light of the fact that there was substantial case law which had been previously decided on the duties owed.

A. There is no confusion among the circuits as to certification.

---

6. Until 1994, the State of Mississippi did not have an intermediary state court of appeals. Thus, the Mississippi Supreme Court suffered a backlog of more than three years, and still continues to have a backlog in spite of some of the pressures which the intermediate Court of Appeals has taken off of its shoulders. Under those circumstances, certification of a question would have served only to create additional expenses and delay for the litigants. It would not have saved the time and energy and resources. Moreover, putting needless certified questions only results in pushing back an already crowded appellate docket. Kirchmayr, *Reducing the Appellate Docket*, Mississippi Judicial College News (1996). (Appendix at A1).

7. In its discretion, the Mississippi Supreme Court has declined to answer certified questions before. *See* Jones v. Harris, 460 So. 2d 120 (Miss. 1984) (declining to answer the question presented); Cowan v. Ford Motor Company, 437 So. 2d 46 (Miss. 1983) (declined to answer because matter was previously decided and was not a matter of great public interest presenting any unique or unusual legal problem not already decided). Even in the case which Petitioner trumps as being demonstrative of this alleged "circuit-split" on certification, Colonial Properties, Inc. v. Vogue Cleaners, Inc., 77 F. 3d 384, *opinion after denial of certified question*, 86 F. 3d 210 (11th Cir. 1996), the state court there declined to answer the certified question posed by the Eleventh Circuit.

The Petitioner does a song and dance about how certain circuits may be certifying more questions than other circuits, and on that basis, the Supreme Court needs to clarify when federal courts should certify issues of state law. This is nothing more than a rouse to create the illusion that there is some tension among the circuits and that an issue has percolated to the point where the United States Supreme Court must address it. No such tension exists.

As a general proposition, a federal court is bound to answer a state law question the way a state court would, and has a duty to predict what that may be. Moreover, where a decision turns upon applicable state law, and the state's highest court has not adjudicated the issue, a federal court must determine what decision the highest state court would reach if faced with the issue. Jackson v. Johns-Mansville Sales Corp., 781 F. 2d 394, *cert. denied*, 478 U.S. 1022 (5th Cir. 1986). *See also* Ryans v. Royal Ins. Co. of America, 916 F. 2d 731 (1st Cir. 1986) (federal court can assume that state's highest court would adopt view which, consistent with its precedent, seems best supported by force of logic and better-reasoned authorities); Plummer v. Lederle Laboratories, Div. Of American Cyanamid Co., 819 F. 2d 349 (2nd Cir. 1987) (federal court sitting in diversity must follow law directed by the Supreme Court of the state whose law is found to be applicable, and if there is no direct decision by the highest court of that state, the federal court should determine what it believes that state's highest court would find if the issue were before it); Howell v. Celotex Corp., 904 F. 2d 3 (3rd Cir. 1990) (in diversity cases, federal courts apply substantive law of state in which district court sat; where that law has not been settled by highest court of state, Court of Appeals must predict possible outcome of that court); Morrissey v. Williams Morrow & Co.,

Inc., 739 F. 2d 962 (4th Cir. 1984) (federal court is justified in adopting single-publication rule in diversity defamation action, even though state Supreme Court had not yet faced such issue); Batts v. Tow-Motor Forklift Co., 66 F. 3d 743 (5th Cir. 1989) (diversity courts follow state law on substantive matters not governed by constitution or by federal law; however, court is not required to be prescient, and *Erie* and its progeny require no more of federal court than conscientiously to satisfy its duty to predict how state court will decide question); Hines v. Joy Mfg. Co., 850 F. 2d 1146 (6th Cir. 1988) (same); Giffin v. Summerlin, 78 F. 3d 1227 (7th Cir. 1978) (same); Dabney v. Montgomery Ward & Co., Inc., 761 F. 2d 494 (8th Cir. 1985) (same); Henkin v. Northrop Corp., 921 F. 2d 864 (9th Cir. 1990) (same); Weiss v. United States, 787 F. 2d 518 (10th Cir. 1986) (same); Towne Realty, Inc. v. Safeco Ins. Co. of America, 854 F. 2d 1264 (11th Cir. 1988) (same).

There are no ambiguities, tensions or glaring contradictions among the circuit courts of appeals on this point. Every circuit accepts the general rule of Lehman Brothers that it is within its discretion to decide whether to have a question certified. However, every circuit also understands that it has a duty to follow that state's law where settled or discernible, and it cannot shirk its responsibility where it may have to predict the outcome on any unsettled or partially settled questions of state law. Since "Congress . . . adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount," it would be intolerable to allow a policy which would strip federal courts of "jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine." Meredith v. City of Winter Haven, 320 U.S. 228, 236-37 (1943).

In her certiorari petition, Mrs. Deramus demands that this Court issue a rule essentially requiring certification in all "*Erie*-guess" cases. Any other rule besides Lehman Brothers discretionary standard would be tantamount to forcing the courts to automatically submit virtually every question of state law to that state's highest court because rarely would two factual situations be mirror images. Salve Regina College v. Russell, 938 F. 2d 315, 318 (1st Cir. 1991) (after remand from the Supreme Court, the First Circuit refused to certify questions to Rhode Island Supreme Court as they were "neither necessary nor appropriate" even though the state court had not yet been "faced squarely" with these "unique facts" or a "fact pattern like this one").

It is clear to all circuits that they can certify questions should they so choose, and that certification in some instances can prove helpful, but that there is absolutely no reason to certify where it is reasonably clear what a state court would do in that circumstance. "It would be manifestly inappropriate to certify a question in a case where . . . there is no uncertain question of state law." Houston v. Hill, 482 U.S. at 471. *See also* VanHaaren v. State Farm Mut. Auto. Ins. Co., 989 F. 2d 1 (1st Cir. 1993) (absent controlling state court precedent, federal court sitting in diversity may certify state law issue to state's highest court or undertake its prediction when course state courts would take is reasonably clear); Watson v. City of New York, 92 F. 3d 31 (2nd Cir. 1996) (certification should be used only when there is a split of authority on issue or when case presents a complex question of state law for which no state authority can be found); Wassall v. DeCaro, 91 F. 3d 443 (3rd Cir. 1996) (federal court was required to do what it predicted Pennsylvania Supreme Court would do, and in making its determination give proper regard to opinions of Pennsylvania's

intermediate courts, policies underlying applicable legal doctrine, current trends in the law, and the decisions of other courts); Roe v. Doe, 28 F. 3d 404 (4th Cir. 1994) (only if available state law is clearly insufficient should federal court in diversity case certify issue to state court); Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co., 958 F. 2d 622 (5th Cir. 1992) (certification to state supreme court is not a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state); Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F. 3d 370 (6th Cir. 1995) (utilization of certification lies within the sound discretion of the judge, and where Kentucky law was relatively settled, it was unnecessary); Patz v. St. Paul Fire & Marine Ins. Co., 15 F. 3d 699 (7th Cir. 1994) (certification unnecessary where there is no room for serious doubt about how state court would answer question); Starks v. Rent-A-Center, 58 F. 3d 358 (8th Cir. 1995) (certification unnecessary where consumer failed to demonstrate that prior decision by district court was clearly erroneous); Micomonaco v. State of Washington, 45 F. 3d 316 (9th Cir. 1995) (certification useless and inappropriate where state court is no better position than federal court to answer unclear question of state law, and use of certification rests within sound discretion of federal court); In re Fingado, 955 F. 2d 31 (10th Cir. 1992) (certification appropriate where no controlling precedent existed in either New Mexico Supreme Court of New Mexico Court of Appeals); Colonial Properties, Inc. v. Vogue Cleaners, Inc., 77 F. 3d 384, *opinion after denial of certified question*, 86 F. 3d 210 (11th Cir. 1996) (first impression question on Alabama state law can be certified, but there is no guarantee that state supreme court will answer question); Noble v. U.S. Parole Comm'n, 82 F. 3d 1108 (D.C. Cir. 1996) (certification proper where relevant dicta sent mixed

signals).[8]

In addition, the Fifth Circuit is the recognized leader in having engineered the certification procedure, and having had the "greatest experience" with it. 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4248, 176 (2d ed. 1988) (general practice is to allow parties to request and form question; upon disagreement, the court presents question on its own). In its certification jurisprudence, the Fifth Circuit endorses the view that certification is properly denied when the case is "long in tooth," when it can be disposed of "with confidence," where the "law involved seems clear on its face," and the federal court is "relatively certain of its meaning," even if it is one of first impression, or where certification entails the delay of months. Marston v. Red River Levee & Drainage Dist., 632 F. 2d 466, 468 n.3 (5th Cir. 1980).

The above cases clearly demonstrate that all circuits understand that certification is the better alternative to abstention; however, should a circuit feel that there is sufficient case law to predict how a state court would answer the question, certification is unnecessary. 17A Wright, Miller &

---

8. There is one circuit which seems to have the lion's share of having certified questions, that being the Eleventh Circuit. *See* Roe v. State of Alabama, 68 F. 3d 404 (11th Cir. 1995); Farsian v. Pfizer, 52 F. 3d 932 (11th Cir. 1995); Campbell v. Cutler Hammer, Inc., 996 F. 2d 1164 (11th Cir. 1993); McGuire Oil Co. v. Mapco, Inc., 958 F. 2d 1552 (11th Cir. 1992). However, just because one circuit disproportionately uses the certification procedure, is no justification to change the Lehman Brothers discretionary standard correctly adhered to by all the other circuits. It is equally important to note that no other circuit has states as volatile as Alabama and Florida in its contingency. Thus, one cannot blame the Eleventh Circuit for certifying a few more questions than the other circuits.

Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4248, 158 (2d ed. 1988); Houston v. Hill, 482 U.S. 451, 468 (1987). While the Supreme Court has encouraged the use of certification as an alternative to abstention, the Petitioner mistakenly believes that this prudent use of certification should be universally extended to apply to all cases involving the divination of state law.

B. Having certified in the recent past a similar question to the Mississippi Supreme Court, and having the benefit of other existing Mississippi case authority, the Fifth Circuit had a more than ample basis to decide the issue of law without resorting to certification.

When "there are no clear controlling precedents in the decisions of the Mississippi Supreme Court, the federal court may certify such questions or propositions of law of this state to the Mississippi Supreme Court for rendition of a written opinion . . . [on] Mississippi law." Rule 20, Mississippi Rules of Appellate Procedure. Thus, where there is controlling precedent, the federal courts have no reason to burden the Mississippi Supreme Court with repetitive questions.

1. Certification in the Recent Past on Question of Duty was Applicable Authority.

This case involves the issue of whether JNL owed a legal duty to warn the Deramuses of a risk JNL neither created nor controlled. The Fifth Circuit had already certified a similar question to the Mississippi Supreme Court in Puckett v. Rufenacht, Bromagen & Hertz, 587 So. 2d 273 (Miss. 1991), and knew from that experience and the guidance provided

therein, how the Mississippi Supreme Court would resolve Deramus' claims. In Puckett, the Fifth Circuit had certified to the Mississippi Supreme Court the questions regarding the existence and/or scope of duties which were allegedly owed by a commodities broker to warn of or protect a customer from risks known to the broker. The Mississippi Supreme Court held that a commodities broker in a nondiscretionary account only owed his customer a duty to properly execute trades as directed by him and did not owe any fiduciary or general negligence duty to intervene and protect or warn against risk within the special knowledge of the broker. Most telling of the duty issue in the instant case is the Mississippi Supreme Court's response to the Plaintiff Puckett's theory that his commodities broker should have gone out of his way to protect him from a peril not created by the Defendant broker:

> If a society is to be free, it must demand of every person who, completely on his own, makes a mistake that he has no legal right to shift from his shoulders onto another's the suffering it causes. In our modern society, en masse we are our brothers' keepers, we pay taxes for schools, highways, public health and hundreds of other public programs. On an individual bases, however, no man should be required by law to pay for what was solely and purely another man's mistake.
>
> It may be morally reprehensible for one man to watch another open a window on the twentieth floor of a skyscraper, climb though it and jumped out, when he could easily have reached out and stopped him. To impose a legal

> responsibility upon the bystander to stop him, however, is an entirely different matter.

Puckett, 578 So. 2d at 278. "The only sin the defendants [commodities brokers] can be accused of committing is standing by while Dr. Puckett committed fiscal hara-kiri." Id. Likewise, while the facts in the case *sub judice* involve an insurance company and a prospective applicant for additional coverage, the reasoning of Puckett is applicable to the question of whether the insurance company has a duty to disclose the results of its underwriting lab tests to the applicant, when the insurance company did nothing to create the HIV virus in Mr. Deramus and where there was no detrimental reliance on the part of Mr. Deramus on an expectation that a life insurance company would safeguard his health.

There was no reason to certify another question on this matter, as clear precedent existed as to how the Mississippi Supreme Court would answer. Judge Wingate, considering Mrs. Deramus' plea in the district court, adopted the above quoted language from Puckett in his opinion, and properly applied it to mean that "where a party does not create or cause the peril, said party is under no obligation to prevent the consequences of the peril." (Petitioner's Appendix at A17). There was no reason for either the district court or the Court of Appeals to certify a question on this point of undertaking duties, as it had been certified before in a similar context, and the answer of the Mississippi Supreme Court left little room for doubt.

2. Clear and controlling precedent existed in Mississippi case law on the duty to disclose.

In addition to Puckett, the Mississippi Supreme Court

had already made several pronouncements on each of the Plaintiff-Petitioner's legal theories for liability, as relied upon and closely followed in the district court's opinion and the Court of Appeals affirmance of the district court's opinion. In addition to the Mississippi authorities cited in the district court's opinion, the Fifth Circuit had before it the reasoning of the Mississippi Supreme Court in Long v. Patterson, 22 So. 2d 490 (Miss. 1945), wherein the court faced a similar duty question, and flatly refused to recognize such a duty:

> Is there a duty imposed by law upon any person to warn another of an approaching or impending danger to the latter, when the person sought to be charged had or has nothing to do with putting into operation, or with the continuance in operation of, the dangerous agency which approaches? Whatever we might think of this as a moral proposition, it is a question to which the settled law gives a negative answer. As stated in the Restatement, Vol. 2 Torts, sec. 314, "the actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action". And an illustration is given as follows: 'A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from doing so by word or touch without delaying his own progress. A does not do so and B is run over and hurt. A is under no duty to prevent B from stepping into the street and is not liable to B'. But the rule is otherwise where the actor undertakes to render such service, although

> gratuitously, and the other person relies on the performance of the undertaking.

Long, 22 So. 2d at 492. This has long been the law, and there has been no intervening case law propounded by the Mississippi Supreme Court to say any differently. Indeed, the Mississippi Supreme Court has underscored that nonphysicians are not held to the duty otherwise expected of physicians to warn or protect others from adverse health conditions. Foster v. Bass, 575 So. 2d 967 (Miss. 1990) (refusing to impose a duty on Catholic Charities for failing to ensure that a child placed through its adoption agency had been tested for Phenylketonuria and refusing to hold it liable for failing to warn that the child was at risk, as Catholic Charities was not a physician, and could not have the duties and standard of care regarding physicians imputed to it). Of course, this was the very duty the instant Plaintiff-Petitioner sought to have imposed by the courts below.

There was more than ample authority under Mississippi law for the Fifth Circuit to rely upon in affirming the holding of the district court without certifying a question *sua sponte* to the Mississippi Supreme Court. In light of the particular authority of Long, Puckett, and Foster, JNL did not have a duty under Mississippi law to tell Mr. Deramus, and most certainly not others, such as his wife, about the results of his blood tests. Had JNL undertaken to tell him, then JNL would have exposed itself to liability should the results have been a false positive. The test results run by JNL were for its own underwriting purposes; the record is crystal clear that Mr. Deramus in no way relied upon JNL to safeguard the condition of his health. The fact that Mr. Deramus' HIV infection was not otherwise medically diagnosed for another eighteen months is hardly JNL's fault. During this period, Mr. Deramus attended to his own health by seeking the

care of numerous physicians of his own choosing.

The duty question is the central issue in this case, not the rate of certification among the various circuits. Petitioner never argued that the ultimate holding of either the Fifth Circuit or that the district court was clearly erroneous, wrong, or unjust, or that the outcome would have been different had the issue been decided by the state court. As Petitioner has failed to even address a contention that certification would have produced a different result, the argument that a question should have been certified is nothing more than an academic exercise.

C. The Petitioner contradicts herself and advances a theory on appeal inconsistent with that argued in the lower courts, and is therefore, procedurally barred.

Petitioner is the one who first filed a motion for summary judgment in district court. There, she advanced four theories of liability on which JNL had a duty to disclose the results of the HIV test. On each one of these grounds, Plaintiff-Petitioner argued that the law in Mississippi was clear and that it was unequivocally in her favor. Upon losing her summary judgment motion in district court, she appealed to the Fifth Circuit Court of Appeals.

In her brief to the Fifth Circuit, Petitioner claimed that "[u]nder **longstanding** and **well-developed case law** in Mississippi and elsewhere, the existing commercial relationship between [the parties] . . . constituted a special or confidential relationship that imposed a higher standard duty of disclosure," (Appellant's Brief at 10), and that "**[s]ound public policy** and **established precedent** [warranted] the duty of disclosure,"

(Appellant's Brief at 11), and that "there [wa]s a substantial basis to reverse the Erie-guess of the District Court as to the extent of the duty imposed upon [JNL] under Mississippi law, so as [to create a jury] question." (Appellant's Brief at 13-14) (emphasis added). The appellant even conceded that "the precise fact situation raised here has not been the subject of prior reported decisions in Mississippi, but **there is a substantial body of case law** that reflects 'the more cogent reasoning of the best and most wide-spread authority' from around the country as to the imposition of a duty in similar circumstances. **Both in Mississippi and elsewhere**, duties have been found to exist and to provide the bases for jury consideration." (Appellant's Brief at 14) (emphasis added). Appellant again stated that the "**Mississippi Supreme Court . . . ha[s] had numerous opportunities to develop the law** for the imposition of duties in [this] state." (Appellant's Brief at 14) (emphasis added). In summation, appellant stated that "[i]t is entirely consistent with the **extensive jurisprudence in Mississippi to impose liability** on [JNL] for its failure to speak." (Appellant's Brief at 23) (emphasis added). In the suggestion for rehearing, Appellant-Petitioner again did not change her posture, and stated that "**Mississippi jurisprudence contains numerous examples** in which . . . to compel disclosure [between two parties]." (Appellant's Rehearing Brief at 12) (emphasis added). This list of quotes is not exhaustive by any means. At each and every turn, she argued that the law was clear to the district court, and to the Court of Appeals, that the law was clear and that the district court had just made an incorrect *Erie*-guess. Not only did Appellant-Petitioner **never** suggest certification to either the district court or the Court of Appeals, due to her insistence about her position being clearly defined in Mississippi law, the Fifth Circuit had no reason to *sua sponte* certify any questions.

However, at this juncture, Petitioner, dissatisfied with the results in each of the lower courts, comes before this Court and argues the complete opposite of what she has been saying all along. Now she states that the law was unclear, ambiguous, and unsettled, and therefore, the issues or questions should have been certified to the Mississippi Supreme Court, as the Fifth Circuit "charg[ed] ahead with speculative answers on broadly important and unsettled issues of state law and public policy." (Petitioner's Petition for Writ of Certiorari at 18). "The purpose of certification is to ascertain what the state law is, not . . . to afford a party an opportunity to persuade the court to say something else." Tarr v. Manchester Ins. Corp., 544 F. 2d 14, 15 (1st Cir. 1976). Mrs. Deramus' changing of the masks is highly disingenuous. This maneuver is nothing more than a desperate ploy for another opportunity to persuade a different court to say something else.

It is a well settled principle that where an appellant pursues conflicting and alternating legal theories on appeal as opposed to in the lower courts, such is procedurally barred. Capps v. Humble Oil & Refining Co., 536 F. 2d 80 (5th Cir. 1976) (a party cannot raise a new theory on appeal that was not presented to the court below); Alexander v. Town & Country Estates, Inc., 535 F. 2d 1081 (8th Cir. 1976) (appellate court will not decide case on legal theory directly contrary to that advanced by appellants at trial); Kassman v. America University, 546 F. 2d 1029 (D.C.Cir. 1976) (litigative theories not pursued in the trial court ordinarily will not be entertained in an appellate tribunal, and questions not properly raised and preserved will normally be spurned on appeal); Universe Tankships, Inc. v. United States, 528 F. 2d 73 (3rd Cir. 1975) (different theory of recovery may not be urged on appeal where prejudice would result to other party); Browzin v. Catholic

University of America, 527 F. 2d 843 (D.C.Cir. 1975) (where plaintiff tries his case on one theory in the district court, without any indication of other theories, he will not ordinarily be heard to press those other theories on appeal). In that vein, Petitioner should be barred from doing an about-face and initiating an argument that Mississippi law on the subject is so unclear as to mandate certification.

CONCLUSION

Despite the unfortunate circumstances surrounding the AIDS-caused death of Frank Deramus, JNL bears no liability in this instance as a matter of Mississippi law. The district court found this to be the case, as well as the United States Court of Appeals for the Fifth Circuit in a de novo review of the district court's reasoning. Displeased with these results, Petitioner now seeks to upset over four years of litigation by asking this Honorable Court to review an issue never addressed by the lower court. Moreover, the certification jargon exposes the inherent contradictions in her request for certiorari, as her current basis for review is in direct conflict with that which she argued to the lower courts. Therefore, the issue of whether a question should have been certified to the Mississippi Supreme Court is barred. While Petitioner has parroted the circuit split criteria for certiorari review by this Court, the alleged inequality among the circuits on rate of certification is not only unfounded, but is hardly of consequence. It is clear that certification is a discretionary matter, has always been a discretionary matter, and in all wisdom and prudence, should always be discretionary, world without end. Furthermore, considering the backlog in the docket of the Mississippi Supreme Court, certification is neither expedient, nor does it guarantee an answer from the state court.

Lastly, the established state law in Mississippi simply will not recognize the claim that the Petitioner has asserted on the merits; accordingly, Petitioner never argues that certification would produce a different result. There is no issue which the Petitioner presents that warrants review by this Court.

FOR THE FOREGOING REASONS, the Respondent respectfully requests that United States Supreme Court deny writ of certiorari in the present case.

Respectfully Submitted,

D. COLLIER GRAHAM, Esq.
Counsel of Record
EUGENE NAYLOR
DEBBIE GOSWAMI
Shell, Buford, Bufkin, Callicutt & Perry
920 Trustmark Building
P.O. Box 157
Jackson, MS. 39205

Dated: January 13, 1997.

MISSISSIPPI JUDICIAL COLLEGE NEWS
Vol. VII, Number 3
Winter 1996

REDUCING THE APPELLATE BACKLOG

By: Steven Kirchmayr,
Court Administrator
Mississippi Supreme Court

For at least fifteen (15) years, appeals to the Supreme Court have steadily increased causing a backlog of cases as well as unacceptable delays in the disposition of cases. The Justices of the Supreme Court, with the support of the bar, brought the appeal backlog/delay problems to the attention of the legislature. In response to the concerns presented, the Mississippi Legislature created the Court of Appeals as well as a new appellate structure. The Judges of the Court of Appeals took office in January, 1995 and immediately began considering cases. The question now is: "What progress has been made in reducing the backlog of appellate cases?"

Prior to 1995, there were more new appeals being filed than dispositions reached in cases. However, during the calendar year 1995, the combined efforts of the Supreme Court and the Court of Appeals resulted in more cases being disposed of than new appeals filed. In 1995, one thousand, three hundred and eighty (1,380) cases were disposed of while one thousand, one hundred and thirty-eight (1,138) new appeals were filed.

Statistics gathered so far in 1996, from January through October, show that nine hundred and sixty-seven (967) new appeals have been filed this year, and that the combined efforts of the Supreme Court and the Court of Appeals have disposed of one thousand, one hundred and eighty-one (1,181) cases, an average of one hundred and eighteen (118) cases per month.

While maintaining its caseload, the Supreme Court has acquired additional duties relating to the new appellate structure. The Court now screens all appeals filed in the Supreme Court to determine which are appropriate for assignment to the Court of Appeals and which should be retained by the Supreme Court. The Supreme Court must also decide whether to review a decision of the Court of Appeals when a party seeks review in the Supreme Court by filing a petition for writ of certiorari.

Of the one hundred and seventeen (117) petitions for certiorari which have been filed in the Supreme Court this year, the Court has disposed of one hundred (100), granting fifteen (15) and denying eighty-five (85). Only seventeen (17) petitions for certiorari were pending before the Court at the end of October.

So far this year, the number of motions filed in the Supreme Court, excluding motions for time, was two thousand, five hundred and fourteen (2,514), and the Supreme Court had disposed of two thousand, six hundred and sixty-eight (2,668) motions.

In the years preceding 1995, the number of cases pending at the end of each year in the Supreme Court steadily increased. Since 1995, however, the number of pending cases had decreased by two hundred and thirty-three (233) cases. By October of this year, the number of pending cases had further decreased by two hundred and fourteen (214) cases.

Hard work by the justices of the Supreme Court and the judges of the Court of Appeals has made the significant reduction in the backlog of cases in the past twenty-two (22) months possible. All of the justices, judges, lawyers, and legislators who participated in planning and creating the new appellate structure have every right to be extremely pleased, because the backlog of appellate cases should be nonexistent at the end of the next twenty-two (22) months.